ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

ARIZONA SUPREME COURT
ADMINISTRATIVE OFFICE OF THE COURTS
1501 West Washington - Phoenix Arizona 85007- 3231

Public Information Office: (602) 542-9310

STATE OF ARIZONA v. RONALD KEITH TSCHILAR.
1 CA-CR 00-0495 (Opinion)
CR-01-0320-PR

I. Petition for review filed by Diane S. McCoy, representing defendant Tschilar. Response filed by AAG Consuelo M. Ohanesian.

II. ISSUES PRESENTED FOR REVIEW

"Does *Apprendi vs. New Jersey*, 530 US 455, 147 L Ed 2d 435, 120 S Ct 2348 (2000) require a jury determination of whether or not a victim in a kidnapping case has been released unharmed and prior to the completion of an offense enumerated in A.R.S. 13-1304(A), thereby rendering the determination of such fact to be an element of the crime and effectively overruling *State v. Eagle*, 196 Ariz. 188, 994 P.2d 395 (2000)?"

III. SUMMARY

A.R.S. § 13-1304 provides that a person commits kidnapping by knowingly restraining another person with the intent to commit one of several enumerated acts, including inflicting death, physical injury or a sexual offense on the victim or placing the victim in reasonable apprehension of imminent physical injury. Subsection B identifies circumstances under which kidnapping can be a class 2 or class 3 or class 4 offense. If the State proves the facts in subsection A (knowing restraint of another person with the required intent), the offense is class 2. If the defendant has a change of mind after restraining the victim with the intent to do one of the acts listed and releases the victim voluntarily, in a safe place, without injury, prior to arrest, and prior to accomplishing any of the enumerated offenses that he originally intended to commit, the kidnapping is class 4. It is class 3 if the defendant releases the victim pursuant to an agreement with the State and without any physical injury. If the victim is under 15 years old, kidnapping is always a class 2 felony.

In *Apprendi*, the Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-2363.

Tschilar was charged with four counts of kidnapping and four counts of aggravated assault. He submitted jury instructions that would have asked the jury to determine if he released the victims voluntarily, unharmed, prior to the commission of any of the enumerated offenses in 13-1304(A). Instead, the trial court made the decision at the time of sentencing, ruling that the four kidnapping convictions were all class 2 felonies. The Court of Appeals held that the procedure did not offend the holding in *Apprendi*.

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Terry Stewart v. Robert D. Smith,
CV-01-0433-CQ

Parties/Counsel:

Terry Stewart as Director of the Arizona Department of Corrections is represented by Assistant Attorney General Kent E. Cattani.

Robert D. Smith is represented by S. Jonathan Young.

The Arizona Capital Representation Project as Amicus Curiae is represented by Julie S. Hall and Denise I. Young.

Facts/Issue:

The Arizona Supreme Court accepted jurisdiction of the following certified question from the U.S. Supreme Court in Stewart v. Smith, 534 U.S. ___ (2001) (No. 01-339):

> At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), see Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), depend upon the merits of the particular claim, see State v. French, 198 Ariz. App. 119, 121-122, 7 P. 3d 128, 130-131(2000); State v. Curtis, 185 Ariz. App. 112, 115, 912 P. 2d 1341, 1344 (1995), or merely upon the particular right alleged to have been violated, see State v. Espinosa, 200 Ariz. App. 503, 505, 29 P. 3d 278, 280 (2001)?

Definitions:

Rule 32.2(a), Ariz. R. Crim. P., provides:

> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

(1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;

(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;

(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

The "Comment to Rule 32.2(a)(3)" states:

The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must 'knowingly, voluntarily and intelligently' not raise an issue at trial, on appeal, or in a previous collateral proceeding before the issue was precluded. See, Faye v. Noya, 372 U.S. 392 (1963). While that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors. Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant 'knowingly, voluntarily and intelligently' waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim. If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceedings is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel.